In the Supreme Court of the United States

OCTOBER TERM, 1924

READING STEEL CASTING COMPANY, plaintiff in error
v.
THE UNITED STATES OF AMERICA
No. 233

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The appellant entered into a contract with the United States to manufacture for it two castings for flywheels, spoken of herein as a "small flywheel" and a "large flywheel." Appellant was to cast them in the rough and then to ship them to a machining company, which, under a separate contract with the government, was to machine them. The court below found as a fact that neither of the castings as produced by the appellant conformed with the requirements of the contract. They were defective by reason of "checks" or cracks. These defects might have

been remedied by welding after they were revealed by the machining. After the defects had been revealed by the machining the appellant was given the privilege of welding them and so causing the castings to conform to the contract, but did not do so. There was no delivery of the castings except that to the machining company. The United States rejected both castings.

A provision of the contract, paragraph 2 thereof, page 10 of the record, gave the United States the privilege of inspecting, examining, and approving the castings upon their delivery or completion and made this approval a condition precedent of acceptance. The court below found as a fact that as to one of the castings, the "large flywheel," it was not inspected under this provision of the contract within a reasonable time. As to the other casting, the "small flywheel," the court below found as a fact that it was inspected and rejected within a reasonable time.

The findings of fact made by the court below are set out on pages 192 and 193 of the record. The foregoing statement, in so far as it purports to set out facts, is confined to those presented in these findings. No others, we believe, are before the court in a case arising, as does this one, under the Tucker Act.

The issue is whether the United States shall pay the contract price for defective castings, not conforming to the contract, solely because it did not

exercise its privilege under the contract of inspecting, examining, and approving (or rejecting) them within a reasonable time. A lesser issue is, as to the smaller casting, whether this court will go behind the finding of fact that it was rejected by the United States within a reasonable time to determine whether from the evidence before the court below the rejection was within a reasonable time.

ARGUMENT

This is a Tucker Act case. It was for that reason that the Circuit Court of Appeals held that it had no jurisdiction and so transferred the case to this court. As such a case what this court will review is greatly limited. As the court, speaking through Mr. Justice Harlan, in *Chase* v. *United States* (155 U. S. 489, l. c. 500), said:

> But under that act (reference being to the Tucker Act) a judgment of a District or Circuit Court of the United States in an action at law brought against the government, will be reexamined here only when the record contains a specific finding of facts with the conclusions of law thereon. *In such cases this court will only inquire whether the judgment below is supported by the facts thus found.* And, we think, it was also the purpose of Congress to require like specific findings or statements of fact and conclusions of law in cases in equity and in admiralty brought under that

> act in the District and Circuit Courts of the United States, *and to restrict our inquiry in such cases, as in actions at law, to the sufficiency of the facts so found or stated to support the final judgment.* (Italics ours.)

The rule as to a case of this character is the same, therefore, as in a case against the United States originating in and appealed from the Court of Claims. There as here the inquiry of this court is restricted to the single question as to whether the facts as found below support the judgment. (*Mahan* v. *United States,* 14 Wallace, 109, *District of Columbia* v. *Barnes,* 197 U. S. 146.) The evidence below upon which the court's findings of fact were based is not for the consideration of this court unless incorporated in the findings as a part thereof. (*United States* v. *Clark,* 96 U. S. 37.) Nor will this court eke out or supplement the findings of fact from the opinion of the court below. Thus in *Crocker* v. *United States* (240 U. S. 74) the court, speaking through Mr. Justice Van Devanter, said:

> In the briefs reference is made to portions of the opinion delivered in the Court of Claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in *Stone* v. *United States* (164 U. S. 380, 382, 383), that "the findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of

> a jury," and that "we are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings."

Notwithstanding the law as thus declared, appellant in its brief derives its facts in large part from the evidence taken in the District Court and from the opinion of that court, refusing to confine itself, as we submit this court will do, to the findings of fact of the District Court as they are set out in the record on pages 192 and 193. Our argument will be based solely upon the findings of fact, and our query shall be (what this court in *Chase* v. *United States, supra*, said was the only query in a case like this), whether " the judgment below is supported by the facts thus found."

I

As we view it, little argument is required to refute appellant's claim to be paid under the contract for the flywheel discussed in appellant's brief and here as " the small flywheel " and referred to in the findings of fact as the " smaller casting." Consider the case for the moment as dealing only with this " smaller casting." We have the allegation of the petition, page 4 of the record, that the appellant entered into a contract with the United States to make such a casting in accordance with specifications constituting a part of that contract. We have the answer of the United States, page 15 of the record, specifically

denying in paragraph 5 thereof that the appellant furnished a casting in accordance with the specifications and conditions of the contract. We have findings of fact Nos. 1 and 5, pages 192–193 of the record, that the castings, including this one, were not furnished in conformity with the contract. We have the further finding of fact, No. 6, page 193 of the record, that this " smaller casting " was inspected by the United States and rejected within a reasonable time, appellant having agreed, see paragraph 2 of the contract, page 11 of the record, that inspection and approval should be a condition precedent to acceptance. The question is, the only question, do these facts so found support the legal conclusion that the United States is not bound to pay the contract price for this " smaller casting "? Certainly they do. Inferentially appellant so concedes.

Appellant reaches a contrary result by striking out one of the findings of fact made by the court below. He strikes out the finding that the rejection was in a reasonable time *by an argument based upon the testimony in the case, which this court will not consider,* being bound by the finding of fact that the rejection was within a reasonable time. (Cases cited supra.) None of the cases cited by appellant in this connection is a case arising either under the Tucker Act or appealed from the Court of Claims.

Not only for this reason does appellant's attack upon so much of the judgment below fail, but, as we shall see, it fails also for the reasons hereafter to be stated and applying both to the smaller and

the larger casting, the " small flywheel " and the " large flywheel " as they are named in appellant's and our brief.

II

In support of its contention that as to the "larger flywheel" it is entitled to be paid under the contract appellant urges a legal theory with which, abstractly stated, there can be little quarrel. Between two individuals, certainly, if one of them contracts to make a flywheel for the other, delivers it to him, nothing more remains to be done in order to complete it, if it is received by him, and thereafter not rejected within a reasonable time, such other person will be liable for the contract price. Under such circumstances he is deemed in legal effect to have accepted the flywheel. The cases cited by appellant hold no more than this. The rule relied on goes no further. *But that is not this case.*

What are the facts here, that is, as they are presented in the findings of fact, and, again, our inquiry is confined to them.

Is it a fact here that these castings were finally delivered by the appellant to the United States, as fully conforming to the contract, nothing further remaining to be done by the appellant, and that after such a final delivery there was a failure to reject them within a reasonable time? No. Yet that is a prerequisite to the legal theory relied on by the appellant.

There is no finding of fact that the castings were ever delivered to the United States. They were sent to a company which was to do the machining of them, but the duty of the appellant under the contract was not finished when the castings were shipped to the machining company. The contract obligation of the appellant (certainly so much will be conceded) was to furnish sound castings, not castings defective from " checks " or cracks and likely at any moment to fly to pieces on that account. The extent of the " checks " or cracks which were in these castings could not be known until after they were machined. When known, they could be welded. The welding was a part of the contract obligation of the appellant and was necessary to be done by it before its work was complete under its contract. Having done that welding and only then it was in a position to make final delivery of the flywheels to the United States. All of this is clearly supported by the findings of fact as they appear on pages 192–193 of the record.

So the large flywheel was delivered, not to the United States, but to the machining company. It was machined. The machining disclosed cracks indicating the wheel was so defective as not to conform to the contract. " *Plaintiff* (*appellant here*) *was given the privilege of welding the cracks when disclosed by the machining.*" (Finding of fact, No. 4.) " *This welding was, however, not done, nor the castings made as required by the contract.*"

(Finding of fact, No. 5.) No other delivery of any kind is mentioned in the findings excepting this delivery to the machining company, which delivery, as findings 4 and 5 clearly indicate, was not a final delivery to the United States, but merely a temporary dispossession from the appellant of the castings while another contractor did its special work upon them and thereafter the resumption of possession by appellant (at least he had the right to resume possession) until it could complete the work of making the castings in conformity with the contract.

We emphasize the fact that the court below found as a fact that when the machining disclosed that there were cracks in the castings, and that includes the larger casting, the appellant was given the privilege of welding them and so making them conform to the contract requirements and that appellant did not weld them, leaving them in a defective condition. Thereafter there was no delivery to the United States. *In other words there never was delivery of the completed castings. The time did not begin, therefore, within which it was the duty of the United States to reject within a reasonable time.*

Suppose the appellant was to do all the work to be done upon these flywheels, including the machining. It has made the castings in the rough. Next, it has machined them. Cracks are disclosed thereby. Under its contract it is appellant's duty to weld these cracks. It does not do that. Can it

recover from the government the contract price on the ground that the government has not inspected and rejected within a reasonable time? Certainly it can not, because it has never made final delivery under the contract to the government. Is that situation changed because an intermediate operation was performed, not by the appellant, but by an independent contractor? We submit, it is not changed.

We have sought to show by the foregoing that the facts essential to the applicability of appellant's asserted legal theory are absent from this case. There is left the simple situation of an attempt to recover on a contract which has not been performed. Such an attempt, of course, must fail.

III

We have been favored with appellant's brief, disclosing its contentions, only two days before this case is to be called for oral argument. The situation forces us to a perhaps too great condensation of discussion. We respectfully submit, however, that neither of the two contentions which appellant makes is a tenable contention, for the reasons we have stated, and that, therefore, the judgment of the court below should be affirmed.

JAMES M. BECK,
Solicitor General.

MERRILL E. OTIS,
Special Assistant to the Attorney General.

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ADDENDA

The following additional points were made on the oral argument: I. An essential element of appellant's burden is to show it delivered to the United States *the thing it contracted to deliver.* The finding of fact is that it did not do that. *That the United States may be estopped from making a possible defense* does not relieve appellant of an essential element of its affirmative burden. II. Paragraph 2 of the contract, page 10 of the record, shows the contract included a certain " proposal " of appellant. That that was the agreement referred to by the president of appellant (page 103 of the record) that appellant would weld cracks disclosed by machining is indicated by what appellant did under the contract as shown by finding No. 6, page 193 of the record. That appellant construes the contract to require this welding appears from its assignment of error No. 13 (page 196 of the record). Since appellant refused to do the welding, it follows that it never delivered *as completed* either casting. III. Nonrejection within a reasonable time is the equivalent of acceptance *only when standing alone and not when accompanied by other facts inconsistent with acceptance.* Here are such other facts, reasonably to be inferred from the findings of fact, as, notice to the

appellant of the cracks when discovered, giving the appellant opportunity to repair them, appellant's refusal so to do. IV. The two castings constituted a single item (page 8 of the record). Acceptance cannot be presumed from the nonrejection of one-half of an indivisible subject matter of a contract, especially in view of the agreement f the parties (paragraph 8 of the contract, page 13 of the record) that no payments should be made under the contract until both castings were delivered and accepted. V. The United States may not be estopped from defending on the ground of noncompliance with the contract by reason of the mere negligent omission or laches of its officers. *Gaussen* v. *United States,* 97 U. S. 584, 590.

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